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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

OWEN H. BROOKS, *et al.*,
Appellants,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

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REPLY OF OWEN H. BROOKS, ET AL., APPELLANTS, TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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REPLY OF OWEN H. BROOKS, ET AL., APPELLANTS, TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed to reply to the Brief for the United States as Amicus Curiae which was filed this month [1] and as a supplemental brief pursuant to Sup. Ct. Rule 16.6 to call the Court's attention to intervening facts not available at the time of the filing of our last brief some four months ago.

Appellants also give notice to the Court that *Mississippi* v. *Smith*, No. 82-540, the case in the District Court for the District of Columbia in which Mississippi is seeking Section 5 preclearance of S.B. 2001, the "least change" plan, has been dismissed by the District Court on the motion of the state. Order of April 11, 1983. Mississippi's appeal in No. 82-540 therefore should be dismissed as moot, and the dismissal of that action also should have

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[1] This Court invited the Solicitor General to file a brief expressing the views of the United States on November 1, 1982. 51 U.S.L.W. 3339.

a direct bearing on the appeal in No. 82-413, *Winter* v. *Brooks*, in which the state contends that the Mississippi District Court in this case erred in not ordering into effect the unprecleared "least change" plan for the 1982 Mississippi congressional elections.

I. THE SOLICITOR GENERAL'S ARGUMENT THAT THE COURT-ORDERED PLAN SATISFIES THE SECTION 5 OBJECTION TO S.B. 2001 (THE LEAST CHANGE PLAN) AND MEETS SECTION 5 STANDARDS IS ERRONEOUS AND SHOULD BE REJECTED.

The Solicitor General contends in his brief that the Section 5 objection to S.B. 2001, the "least change" plan, "objects only to the fragmentation of the Delta by use of horizontally drawn district lines" (Brief, p. 12), and that the court-ordered plan, the "Simpson plan," by reuniting the Delta, meets this objection: "The Simpson Plan reunites the Delta. No more was required by the Attorney General's objection to S.B. 2001" (*id.*). With deference, this contention is erroneous and should be rejected.

A. The text of the Section 5 objection letter itself shows that while the Attorney General objected to the dismemberment of the Delta area, this was not the "only" or exclusive basis for the objection. The Section 5 objection letter also states that the Attorney General has an obligation to assure himself that "the instant plan 'fairly reflects the strength of black voting power as it exists'" (quoting *Mississippi* v. *United States*, 490 F. Supp. 569, 581 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980)), and the letter objects to lines which "dismember the black population concentration *and effectively dilute its voting strength*" (J.S., App. B, p. 27a) (emphasis added). The letter of objection notes that prior to the adoption of the Voting Rights Act, the preexisting Delta district "included a sixty five percent black population majority" (*id.*, p. 26a), and that the lines of S.B. 2001

suggested "an unnecessary retrogression in the position of black voters in Mississippi" (*id.*, p. 28a).[2]

B. Simply putting the Delta counties back together again in a single district cannot, by itself, remedy this Section 5 objection because fragmentation or dismemberment of a black population concentration is not the only method by which a redistricting plan can fail to "fairly reflect[] the strength of black voting power as it exists," "effectively dilute its voting strength," or effectuate "an unnecessary retrogression in the position of black voters in Mississippi." Racial gerrymandering of district lines can be accomplished by "cracking," "stacking," and "packing."[3] "Cracking" is the fragmentation and dispersal of a black population concentration; "stacking" occurs when a black population concentration is unnecessarily combined with a white population concentration and black voting strength is diluted; and "packing" is the overconcentration of minority populations in a single district greatly in excess of the percentage needed for minority voters to elect candidates of their choice.[4] The Simpson plan dilutes black voting strength in the Delta area by "stacking."

The facts of this case strongly point to a conclusion that the Simpson plan has the purpose and effect of diluting black voting strength in the Delta area. Historically, the majority black counties of the Delta area together formed a separate congressional district.[5] Suddenly, after

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[2] Also implicit in the objection letter is the fact that the Mississippi Legislature, by dividing the Delta, created two districts which were only 47.95 percent black and 45.32 percent black. J.S., pp. 3, 12-14. Acknowledgement of these statistics was necessary to findings that the "least change" plan "effectively dilut[ed] [black] voting strength" and represents "an unnecessary retrogression in the position of black voters in Mississippi."

[3] See Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 Miss. L.J. 391, 402-03 (1973).

[4] *Id.*

[5] Mississippi had a majority black Delta congressional district from 1882 to 1966. J.S., p. 16.

the latest plan which fragmented the Delta area has been invalidated, the thirteen majority black counties in the Mississippi Delta are unnecessarily combined in an irregularly-shaped district with six predominantly white Hill counties in the east-central portion of the state, counties which historically have not been included in the Delta congressional district.[6] J.S., pp. 18, 25-26. In spite of Mississippi's stipulation that election districts in Mississippi must be at least 65 percent black in population or 60 percent black in voting age population to give black voters an opportunity to elect candidates of their choice (Ex. P-1, p. 5 ¶ 16), a primary reason given for this unprecedented aggregation of majority black counties with majority white counties is to minimize black voting strength at the 40 percent or better level (J.S., App. A, p. 14a). Alternatives were presented to the District Court which would have restored the Delta district in districts which are more compact and contiguous without including these six predominantly white Hill counties. J.S., pp. 26-27.[7] The aggregation of the Simpson plan thus reduces what previously was and still could be a 65 percent black Delta district to a district in which black voters constitute only 53.77 percent of the total population and only 48.76 percent of the voting age population,[8]

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[6] Apart from race, "[t]he deepest split in Mississippi politics is between the Delta and 'the hills'; this split has affected history in the state since before the Civil War." J. Loewen & C. Sallis, MISSISSIPPI: CONFLICT AND CHANGE 17 (rev. ed. 1980); also, V. O. Key, Jr., SOUTHERN POLITICS IN STATE AND NATION, ch. 11, "Mississippi: The Delta and the Hills" (1949).

[7] The Solicitor General in his brief concedes that the primary reason given by the District Court for rejecting both of the Kirksey plans, that creating a majority black district constituted racial gerrymandering (J.S., App. A, pp. 13a-14a), is erroneous as a matter of law under this Court's decision in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977). Brief, p. 17 n. 17. This, in itself, is sufficient to require reversal of the District Court's decision.

[8] Exhibit P-17, Revised Exhibit, containing statistics stipulated by defendants as correct, reflects that District 2 in the Simpson

"turning Negro majorities into minorities." *Sims* v. *Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965) (three-judge court). The conclusion is inescapable that these six heavily white Hill counties were linked needlessly with the Delta counties for the purpose of preventing the election of a black member of Congress, and it definitely has had that effect.[9]

C. *Upham* v. *Seamon*, 456 U.S. 37 (1982), requires that before a state's legislative policies may be considered, a remedial plan proposed to remedy a Section 5 objection must first meet "the substantive constitutional and statutory standards to which such state plans are subject" (*id.* at 42). Prior Section 5 cases demonstrate that "stacking" is just as offensive to Section 5 standards as other forms of gerrymandering. The Justice Department's position in this case contradicts the position it has taken in these prior cases and Section 5 administrative proceedings. In the Mississippi legislative reapportionment case the Attorney General objected under Section 5 to multi-member legislative districts in which black majority counties were unnecessarily combined with white majority counties wherever possible to form districts with white voting age population majorities. Memorandum for the

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plan is only 48.76 percent black in voting age population. Our Jurisdictional Statement (p. 6, footnote 4) should thus be corrected to reflect this figure. Ex. P-17, as revised, states the following black voting age population percentages for the five districts in the Simpson plan:

District	Black VAP Percent
1	21.91%
2	48.76%
3	29.53%
4	38.48%
5	17.35%

[9] State Rep. Robert Clark, a black state legislator who had the support of the black voters and the white Democratic leadership of the state, was defeated in the November, 1982 general election in this district by a white Republican who ran a racially-charged campaign. See our Supplemental Brief for Appellants, filed in December.

United States as *Amicus Curiae*, pp. 16-17, App. B, p. B-6, *Connor* v. *Waller*, 421 U.S. 656 (1975). In 1981 in the Virginia legislative reapportionment case the Attorney General objected to House districts in which each of "five majority black counties is combined with one or more predominantly white counties in such a way that there is a black minority in each of the resulting districts," and also objected to a House district in which the City of Petersburg, which is 61 percent black, was unnecessarily combined with an adjacent predominantly white city to convert a black majority district into a black minority district.[10] The Attorney General also has objected to Mississippi county redistricting plans for "stacking."[11]

"Stacking" has been condemned as violative of constitutional voting rights guarantees as well. Applying constitutional principles against inpermissible racial dilution, this Court in *Connor* v. *Finch*, 431 U.S. 407 (1977), disapproved a court-ordered legislative reapportionment plan which unnecessarily combined majority black counties with adjacent majority white counties and beats to create districts with white voting majorities (431 U.S. at 424-25). Similarly, in *Sims* v. *Baggett*, *supra*, a three-judge District Court struck down as unconstitutional for racial gerrymandering a legislative reapportionment plan in which majority black counties were unnecessarily aggregated with majority white counties to dilute black voting strength (247 F. Supp. at 109).

D. Thus, contrary to the Solicitor General's argument, the Simpson plan cannot pass Section 5 muster simply because it restores the Delta counties in a single district and creates a 53.77 percent black district. Restoring the

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[10] Section 5 objection letter to Va. Acts, 1981, ch. 5, letter from William Bradford Reynolds, Assistant Attorney General, to Perkins Wilson, July 31, 1981, reprinted in *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 466-67 (1982).

[11] See Parker, *County Redistricting in Mississippi*, *supra*, 44 Miss. L.J. at 405-08.

Delta, in and of itself, does not necessarily ameliorate dilution of black voting strength. If, in the Second District of the Simpson plan, the Delta counties were linked with a number of predominantly white counties to create a district which was 47.95 percent black—the identical racial percentage of the Second District in the objected-to "least change" plan (J.S., p. 3), putting the Delta counties in one district—in and of itself—clearly would not satisfy the Section 5 objection. Section 5 case law is clear that the nonretrogression and anti-dilution standards of Section 5 are not satisfied merely because a district with a slight black population majority is created. In *Donnell* v. *United States*, Civil No. 78-0392 (D.D.C. July 31, 1979), *aff'd mem.*, 444 U.S. 1059 (1980), a Mississippi Section 5 preclearance case, the District Court disapproved a plan which created two districts which were 61.0 percent and 60.6 percent black, respectively, because they were retrogressive of preexisting levels of black voting strength and because they failed to accord black voters the opportunity to elect candidates of their choice. More recently, in *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 51 U.S.L.W. 3552 (U.S. Jan. 24, 1983), the District Court disapproved under Section 5 as racially motivated a Georgia congressional redistricting which split up the black population concentration in southern Fulton and DeKalb counties, but which contained a congressional district which was 57.28 percent black (549 F. Supp. at 498).[12]

[12] Districts with razor-thin black population majorities which dilute black voting strength have been struck down in constitutional litigation as well. In *Connor* v. *Finch*, *supra*, this Court disapproved five senatorial districts in Hinds County for dilution of black voting strength (431 U.S. at 423). Two of those districts were 54.0 and 53.4 percent black, respectively, but only 48.6 and 48.0 percent black in voting age population. Brief for the United States, App. C, p. 49a, *Connor* v. *Finch*, 431 U.S. 407 (1977). The senatorial district which included Jefferson County and parts of Adams County, also disapproved by this Court (431 U.S. at 424-25), was 56.6 percent black in population and 52.1 percent black in voting age population. Brief for the United States, App. C, p. 71a. The Fifth Circuit sitting *en banc* in *Kirksey* v. *Board of Super-*

E. The Solicitor General's argument overlooks these important legal principles established in both Section 5 and constitutional litigation, and also neglects to consider the trial record and the facts of this case. His suggestion that the District Court's approach was correct in choosing a plan "that the State legislature most likely would have adopted" is blind to the documented historical record of purposeful racial gerrymandering by the Mississippi Legislature in congressional redistricting since 1966 (J.S., pp. 16-23). The Solicitor General's argument also ignores the stipulated fact that the Second District in the Simpson plan is majority white in voting age population and only 48.76 percent black in voting age population,[13] Mississippi's stipulation that a district must be at least 60 percent black in voting age population to give black voters an opportunity to elect candidates of their choice, and the defeat under the Simpson plan of a heavily-favored and widely-supported black candidate in the November general election.

II. SWORN TESTIMONY, TAKEN AFTER THE TRIAL IN THIS CASE, SHOWS THAT THE DISTRICT COURT ERRED WHEN IT RULED THAT THE CREATION OF 40 PERCENT BLACK OR BETTER "HIGH IMPACT" DISTRICTS WAS A STATE POLICY FOLLOWED IN MISSISSIPPI CONGRESSIONAL REDISTRICTING.

The District Court's preference for the Simpson plan (and its rejection of the Kirksey plans) was based on its finding that the Joint Congressional Redistricting Com-

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visors of Hinds County, 554 F.2d 139 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977), struck down as unconstitutional the same Hinds County districts (used as county supervisors' districts) disapproved by this Court in *Connor* v. *Finch* (see 554 F.2d at 141).

[13] As this Court said in *City of Rome* v. *United States*, 446 U.S. 156, 186 n. 22 (1980), a Section 5 preclearance case, current voting-age population data are "more probative" of whether or not dilution exists "because they indicate the electoral potential of the minority community." Accord: *Kirksey* v. *Board of Supervisors of Hinds County, supra*, 554 F.2d at 149-50.

mittee, chaired by Rep. Thomas H. Campbell, III (J.S., App. A, p. 4a), and the Mississippi Legislature adopted as a state policy, in enacting the "least change" plan, of establishing "two districts with 40% or better black population" (*id.*, p. 12a). The Simpson plan was thus preferred by the District Court because it concluded, under *Upham* v. *Seamon*, *supra*, that it was obliged to effectuate this political policy of the state. The District Court's finding regarding this purported state policy was based on the trial testimony of Rep. Campbell himself (Tr. 133-250).

In a subsequent deposition, taken on March 16, 1983 in *Mississippi* v. *Smith*, the D.C. District Court Section 5 preclearance case, Rep. Campbell contradicted his *Brooks* v. *Winter* trial testimony to say that this 40 percent "high impact" theory was only his observation of the legislative behavior of his colleagues, and that it was not the recommendation of the Legislature's Joint Congressional Redistricting Committee nor a criterion, guideline, or goal in Mississippi congressional redistricting:

> Q. Was the joint committee's recommendation to the legislature drawn with the intent of coming out of districts which were forty percent black or better?
>
> A. No.
>
> Q. Was this a criterion or guideline in the drafting of the joint committee's recommendation?
>
> A. No.
>
> Q. Was it a goal?
>
> A. No, with the exception that we were trying to prevent retrogression of the black populations that were in those districts previously and they happen to be above forty percent in two of the districts so that we were trying to prevent any diminution of those percentages. I don't know if that's what you're talking about or not.
>
> Q. Was the racial percentage a criterion that you followed?
>
> A. In that way, yes.
>
> Q. But, that was only to not reduce the percentages of the existing districts?
>
> A. That's right.

Q. It wasn't to achieve forty percent or better as a goal?

A. No.

Deposition testimony of Rep. Thomas A. Campbell, III, pp. 75-76, *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C.).[14]

This new testimony shows that the finding of the District Court in this case that there was a "legislative preference for two high black impact districts" (J.S., p. 13a) is clearly erroneous and that there was no such state policy. Rep. Campbell's new testimony goes to the heart of the District Court proceedings in this case, and requires reversal of the District Court's decision.

CONCLUSION

The District Court's decision should be reversed and the case remanded to the District Court for the formulation of an interim court-ordered plan which remedies the Section 5 objection in this case and provides black voters of Mississippi with an opportunity to elect candidates of their choice.

Respectfully submitted,

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[14] A copy of this deposition will be filed with the Clerk.